No. 18-15

IN THE

Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF *AMICUS CURIAE* OF THE CENTER FOR WORKPLACE COMPLIANCE IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF THE CENTER FOR WORKPLACE COMPLIANCE IN SUPPORT OF PETITIONER

The Center for Workplace Compliance respectfully submits this brief as *amicus curiae*.[1] The brief supports the position of Petitioner before this Court and thus urges reversal of the decision below.

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

Founded in 1976, the Center for Workplace Compliance (CWC) (formerly the Equal Employment Advisory Council (EEAC)) is the nation's leading nonprofit association of employers dedicated exclusively to helping its members develop practical and effective programs for ensuring compliance with fair employment and other workplace requirements. Its membership includes more than 200 major U.S. corporations, collectively providing employment to millions of workers. CWC's directors and officers include many of industry's leading experts in the field of equal employment opportunity and workplace compliance. Their combined experience gives CWC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of employment-related laws and regulations.

Accordingly, the issue presented in this case is extremely important to the nationwide constituency that CWC represents. The question whether this Court's holdings in *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), should be overruled will have substantial legal and practical impacts on all employers subject to federal agency regulation.

CWC has participated in a number of cases involving deference to agency interpretations of regulations and statutes. *See, e.g.*, *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012); *Federal Express Corp. v. Holowecki*, 552 U.S. 389 (2008); and *Edelman v. Lynchburg College*, 535 U.S. 106 (2002). Because of its experience in these matters, CWC is especially well-situated to brief this Court on the importance of

the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Petitioner James Kisor is a Vietnam-War veteran who applied to the Department of Veterans Affairs (VA) for disability benefits in December 1982 for his service-related post-traumatic stress disorder (PTSD). Pet. App. 2a. After receiving conflicting reports on Kisor's diagnosis, the VA denied his application for disability benefits. Pet. App. 3a.

On June 5, 2006, Kisor re-applied for disability benefits on the basis of PTSD. Pet. App. 4a. Based on the materials presented in connection with the re-application, the VA this time agreed that Kisor suffered from service-related PTSD and assigned an effective date for his benefits eligibility as June 5, 2006. *Id.*

Kisor appealed this determination to the Board of Veterans' Appeals (Board), arguing that pursuant to 38 C.F.R. § 3.156(c) of the VA's regulations, his eligibility for benefits should be retroactive to December 1982 when he initially applied. Pet. App. 6a. Section 3.156(c)(1) provides that the VA will "reconsider" a claim if it "receives ... *relevant* official service department records that existed and had not been associated with the claims file when VA first decided the claim ...." Pet. App. 7a (emphasis added). The Board denied Kisor's request for retroactive benefits on the ground that he failed to present "relevant" records as required by 38 C.F.R. § 3.156(c)(1) because none of the records demonstrated that the VA erred in 1983 when it found that he did not suffer from PTSD. Pet. App. 8a.

Kisor appealed the Board's adverse ruling to the U.S. Court of Appeals for Veterans Claims, and losing there, Pet. App. 9a, further appealed to the U.S. Court of Appeals for the Federal Circuit, arguing that the VA's interpretation of what constitutes "relevant" records under 38 C.F.R. § 3.156(c)(1) was erroneous. Pet. App. 10a. On appeal, the Federal Circuit affirmed the Board's denial of retroactive benefits. Pet. App. 19a. The court found that § 3.156(c)(1) was ambiguous as to the meaning of the term "relevant" and applying *Auer v. Robbins*, 519 U.S. 452 (1997) and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), it deferred to the VA's interpretation of the regulation. Pet. App. 14a-19a.

Kisor filed a petition for a writ of certiorari, which this Court granted on December 10, 2018. *Kisor v. Wilkie*, 2018 WL 6439837 (Dec. 10, 2018).

SUMMARY OF ARGUMENT

Auer deference undercuts the rule of law by thwarting a regulated entity's right to fair notice and certainty about what it must do to comply with the multitude of complex federal laws and regulations that apply to it. This is especially true of U.S. employers who are subject to myriad workplace rules enforced by multiple federal agencies. For decades, federal courts have relied on the Court's rulings in *Seminole* and *Auer* to justify giving controlling weight to an agency's interpretation of its own ambiguous regulation, even when set forth in an informal pronouncement, such as an *amicus* brief.

Under the U.S. Constitution and the Administrative Procedure Act (APA), however, it is the responsibility of the federal judiciary to interpret federal law. *Auer* interferes with that duty. It emboldens an already

powerful and increasingly politicized administrative state, making it more difficult for the courts to "police the boundary between the Legislative and the Executive ...." *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 327 (2013) (Roberts, C.J., dissenting). In addition, *Auer* deference deprives employers of advance notice of an agency's change in position, thus denying companies the due process protections afforded by the APA. As a practical matter, *Auer* dissuades courts from engaging in any meaningful review of the reasonableness of an agency's interpretation, resulting in a judicially-sanctioned end-run around the APA-mandated notice-and-comment rulemaking process and thus allowing agencies to legislate by administrative whim. Accordingly, *Auer* deference to agency policy interpretations of its own regulations not only undermines the critical purpose of notice-and-comment rulemaking, but also encourages regulators to promulgate intentionally vague rules armed with the knowledge that they will be accorded significant leeway – indeed, controlling deference – in future interpretations beyond the scope of public input and scrutiny.

The application of *Auer* deference as a device for resolving disputes over ambiguous regulations has implications for every employer that is subject to workplace compliance regulations. Under the current standard, controlling deference is accorded even to novel agency positions or those that do not represent the best interpretation of the regulation at issue. *See Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 613 (2013) (applying *Auer* deference and ruling that "an agency's interpretation need not be the only possible reading . . . —or even the best one—to prevail"); *Talk America, Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 64 (2011)

("novelty alone is not a reason to refuse deference" to an agency explanation of its own ambiguous rule).

Agencies take advantage of *Auer* by pronouncing new interpretations of their own regulations, often in *amicus* briefs, knowing that such explanations are likely to be afforded controlling deference. There are countless examples of agencies like the DOL and the EEOC pressing breathtakingly broad, informal regulatory interpretations and when challenged, arguing for, in effect, unquestioned deference under *Auer*. *See infra*, Section II.

Auer makes it more unlikely for courts to delve into the reasonableness of an agency's interpretation, which greatly impacts posturing when a dispute arises over an ambiguous rule. Agencies are willing to take a harder pre-litigation stance, and employers are less willing to challenge even wildly overbroad agency positions, knowing that chances are good the agency, invoking *Auer*, will likely prevail.

ARGUMENT

I. *AUER* DEFERENCE UNREASONABLY INTERFERES WITH EMPLOYERS' ABILITY TO COMPLY WITH ALREADY-COMPLEX REGULATORY OBLIGATIONS

A. *Auer* And *Seminole Rock* Undermine The Value Of Notice-And-Comment Rulemaking

Auer deference undercuts the rule of law and harms responsible employers by, among other things, eliminating the regulatory certainty and reliability that flows from notice-and-comment rulemaking. Bound by this precedent, courts across the country default to the position that an agency's interpretation of its own

ambiguous regulation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Seminole Rock*, 325 U.S. at 414. Employers already face numerous challenges in attempting to comply with the many complex laws and regulatory schemes that govern their actions, including rules implementing the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*, to name but a few. From an employer's perspective, it is imperative that a company be able to rely upon the text of a regulation, without fear that with every change in administration, the promulgating agency will seek to effectuate a change in position simply by issuing a new "informal" policy document or inserting itself into litigation as an *amicus curiae*.

Auer deference encourages federal agencies to draft ambiguous rules during the notice-and-comment period, while at the same time discouraging them from correcting existing, ambiguous rules. Both outcomes present damaging implications for notice-and-comment rulemaking and allow policy shifts, through informal avenues, that an agency otherwise would be unwilling or unable to advance through formal notice-and-comment rulemaking. Thus, "deferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government." *Talk America*, 564 U.S. at 69 (Scalia, J., concurring).

The *Auer* doctrine allows agencies to significantly alter employers' compliance obligations simply by announcing a change in enforcement philosophy

either through a policy document or an *amicus curiae* brief filed with any one of the nation's more than 100 federal district and circuit courts. It discourages agency transparency and encourages abuse by removing the important notice-and-comment procedures required by the APA.

Notice-and-comment rulemaking allows employers to provide critical insight into proposed rules on real-world issues that a regulator might otherwise overlook. By allowing agencies to promulgate guidance outside of notice-and-comment rulemaking, that then effectively is treated as controlling, *Auer* deprives employers of the ability to provide meaningful input into the rules that govern them. It also blurs the line between legislative and interpretive rules, which this Court has said carry different legal weight. *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1211-12 (2015) (Scalia, J., concurring) ("By supplementing the APA with judge-made doctrines of deference, we have revolutionized the import of interpretive rules' exemption from notice-and-comment rulemaking. Agencies may now use these rules not just to advise the public, but also to bind them").

In short, *Auer* deference changes the field of employment regulations from complex to unfair for employers that are trying earnestly to play by the rules. Regulated entities need the best and most reasoned guidance possible. By shirking the vital notice-and-comment rulemaking process, *Auer* inserts uncertainty and inconsistency into an employer's ability to reasonably interpret employment regulations and avoid unfair surprise.

B. Fulsome Judicial Review Of Agency Policy Interpretations Provides A Much Needed Check On The Administrative State

Rather than making employers subject to the whims of a questionably-motivated regulator, a neutral court should decide what a regulation means, using the same tools that are at the disposal of a private party who is trying to comply with the regulation. This rule is not only sensible and in line with constitutional separation of powers principles, but also is mandated by the APA, which requires "the reviewing court [to] determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. Neutral courts are in the best position to decide how an ambiguous regulation, as written, and considering all permissible additional materials, should reasonably interpreted by a regulated employer. Unlike the DOL and the EEOC, federal judges have little incentive to mold existing rules to fit any given Administration's often ephemeral policy goals. A court is in as good or better a position as the agency to interpret the text of a regulation that carries the force of law, and under the Constitution, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

While it may seem intuitive to defer, at least in some sense, to an agency's interpretation of its regulations, according "controlling" deference to regulatory interpretations expressed through informal means tramples on the "fundamental principles of separation of powers," leaving the agency—or, more properly, the agency's drafting attorney—with both legislative and executive powers. *Talk America*, 564 U.S. at 68 (Scalia, J., concurring).

It is also important to recognize that while a few employers may be willing to incur the significant expense of fighting an agency on the questionable interpretation of its own regulation, most employers will not take that risk, knowing that most courts reflexively will defer to an agency's explanation, without delving into the reasonableness of that explanation. At the same time, *Auer* emboldens agencies to take harder pre-litigation stances on questionable regulatory explanations. As a result, employers are left settling enforcement actions for large sums or expending substantial resources to comply with a wrong-headed interpretation of an ambiguous regulation.

Auer deference also encourages the DOL and other federal agencies to act as regulatory "watchdogs," often appearing as *amicus curiae* in cases solely to advance their novel interpretation of inherently and intentionally ambiguous regulations, without the consideration or benefit of public notice and comment. *See, e.g., Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170-71 (2007) (applying *Auer* to an agency interpretation that was inconsistent with a previous interpretation of the same regulation and that changed during pending litigation to support a litigant who lost in trial court). To the extent that *Auer* has enabled such behavior, it serves no legitimate purpose and should be overruled.

II. AGENCIES TOO OFTEN ABUSE DEFERENCE ACCORDED THEM UNDER *AUER*

Federal agencies like the DOL of course are entitled to express their opinions through informal means such as policy documents and *amicus* briefs, but those opinions cannot and should not be given "controlling" deference merely because they are not "plainly

erroneous or inconsistent." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 154-55 (2012). Under *Auer*, however, an agency's rationalization "need not be the only possible reading . . . —or even the best one—to prevail." *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 613 (2013). Agencies regularly take advantage by imploring courts to not worry themselves with the proper interpretation of a rule in the name of *Auer*.

In *In re Novartis Wage and Hour Litigation*, for instance, the Second Circuit held that pharmaceutical sales representatives (PSRs) were considered nonexempt from overtime pay under the FLSA's "outside salesmen" exemption. 611 F.3d 141, 153-55 (2d Cir. 2010), *abrogated by Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012). For decades, PSRs were considered to fall within this exemption, and the DOL had done nothing to challenge their exempt status. Then in 2009, the DOL filed an *amicus* brief with the Second Circuit in which it argued, for the first time, that under its FLSA regulations, PSRs fell outside of the law's exemption and thus were entitled to overtime pay. *In re Novartis Wage and Hour Litigation*, 611 F.3d 141 (2d Cir. 2010) (Brief for the Secretary of Labor as *Amicus Curiae* (Oct. 13, 2009)). The Second Circuit, citing to *Auer*, deferred to the DOL's novel interpretation and ruled against the employer. *Id.* at 153-55.

Two years later, this Court, ruling in a different case on that same issue, held that the DOL's position was not entitled to any deference because nothing in the plain text of the FLSA or the DOL's implementing regulations provided "clear notice" to employers that PSRs were nonexempt. *SmithKline*, 567 U.S. at 157. Furthermore, despite the industry's decades-long

practice of classifying PSRs as exempt, the DOL never initiated any enforcement actions or otherwise suggested that it thought the industry was acting unlawfully. *Id.*

> It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.

Id. at 158-59.

After determining that DOL's new interpretation was not entitled to any deference, the Court then conducted its own analysis of the text of the FLSA and the implementing regulations to determine whether PSRs are exempt. The Court answered in the affirmative, vindicating the employers' attempted reliance on the best reading of the pertinent regulation.

Another example of *Auer*'s harmful impact on employers is demonstrated by *Marsh v. J. Alexander's LLC*, 869 F.3d 1108 (9th Cir. 2017), *rev'd en banc*, 905 F.3d 610 (9th Cir. 2018), which addressed whether an employer can take a "tip credit" towards the minimum wage calculation for an employee that works for tips but also performs other related non-tip functions. The DOL's regulation clarifies that while a "tip credit" can only be taken for wages earned in connection with hours worked in a tipped job, where a tipped employee has separate but related non-tip duties, such as a waitress who spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses, the employer

can claim the tip credit for all wages earned. 29 C.F.R. § 531.56(e).

The DOL purported to further "interpret" this "related duties" rule in a Field Operations Handbook, which provided that it would treat individuals "effectively employed in dual jobs" the same as individuals actually employed in dual jobs. U.S. Dep't of Labor, Wage & Hour Div., Field Operations Handbook § 30d00(f) (2016) ("Handbook"). The Handbook clarified that any employee who worked "in excess of 20 percent of the hours worked in the tipped occupation in the workweek" doing tasks besides working directly for tips (*e.g.*, "washing dishes or glasses as opposed to waiting on customers") would be considered "effectively employed in dual jobs," *id.*, meaning that the employer would have to pay the regular minimum wage for that time, without being able to discount the employee's tips earned during that time. This "80/20 rule" found in the Handbook was directly at odds with the DOL's own regulation, which included a similar waitress example for when related duties would not be considered a separate job.

In *Marsh v. J. Alexander's LLC*, a three-judge panel of the Ninth Circuit ruled that the employer had properly relied on the regulation when it applied the tip credit to wages earned in connection with related non-tipped jobs performed by tipped employees. 869 F.3d 1108 (9th Cir. 2017). However, the full court sitting *en banc* reversed, holding that *Auer* required deference to the DOL's informal Handbook interpretation of the tip credit regulation. *Marsh v. J. Alexander's LLC*, 905 F.3d 610 (9th Cir. 2018) (*en banc*).

This ruling demonstrates how *Auer* deference makes it incredibly difficult for employers to comply

with any number of complex regulations. Here, the most reasonable reading of the regulation did not control because the *en banc* court, rather than interpreting the text for itself, deferred to the agency's reading, even when it was not the best one. Under the FLSA, the harm caused by *Auer* to employers is even greater because a violation of the minimum wage rule can result in liability not only for "unpaid minimum wages, [but also for] an additional equal amount as liquidated damages." 29 U.S.C. § 216(b).

The DOL is not alone in attempting to press novel interpretations of its own regulations in the name of *Auer*. In *Morriss v. BNSF Railway Co.*, for instance, the EEOC filed an *amicus* brief contending that "an individual is not required to show an underlying physiological cause to establish the impairment of morbid obesity." 817 F.3d 1104 (8th Cir. 2016) (Brief of U.S. Equal Employment Opportunity Commission as *Amicus Curiae* on Behalf of Appellant Melvin Morriss in Support of Reversal, at 13). The agency argued that this interpretation was entitled to controlling deference under *Auer*, despite the fact that the EEOC's regulations implementing the ADA define the term "[p]hysical or mental impairment" as "[a]ny *physiological* disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems." 29 C.F.R. § 1630.2(h)(1) (emphasis added). The agency further explains in its ADA Interpretive Guidance that impairment "does not include physical characteristics such as eye color, hair color, left-handedness, or height, *weight*, or muscle tone that are within 'normal' range and are not the result of a physiological disorder." 29 C.F.R. app. § 1630.2(h) (emphasis added). The Eighth Circuit fortunately recognized that this new interpretation was unsupported by the EEOC's regulation and its own sub-

regulatory enforcement guidance, refusing to defer to the agency's interpretation. *Morriss*, 817 F.3d at 1108-09.

Another egregious example of agency overreach through informal guidance is found in the EEOC's attempt in 2014 to revise its pregnancy accommodation subregulatory enforcement guidance to impose an affirmative obligation on employers to provide pregnancy-related workplace accommodations to the same extent as are provided to non-pregnant workers "similar in their ability or inability to work." EEOC, *Enforcement Guidance on Pregnancy Discrimination and Related Issues*, at I.A.5 (July 2014). However, such an interpretation was inconsistent with the agency's regulation and longstanding policy interpretations, which did not impose an affirmative obligation on employers to provide workplace accommodations to those who, due to ordinary pregnancy (as opposed to a pregnancy-related disability), are unable to perform the essential functions of their jobs. Before this Court, the Solicitor General, joined by the EEOC, argued, albeit unsuccessfully, that the guidance should be given "special, if not controlling, weight." *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1351 (2015).

In the past few years, members of this Court have recognized the abuses that result from application of *Auer* deference. *See, e.g., Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1215 (2015) (Thomas, J., concurring) ("*Seminole Rock* was constitutionally suspect from the start, and this Court's repeated extensions of it have only magnified the effects and the attendant concerns"); *Decker*, 568 U.S. at 615 (Roberts, C.J., concurring) ("It may be appropriate to reconsider [*Auer* deference] in an appropriate case"); *SmithKline*, 567 U.S. at 158 ("Our practice of deferring

to an agency's interpretation of its own ambiguous regulations ... creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit ....") (citation omitted); *Talk America*, 564 U.S. at 68 (Scalia, J., concurring) (*Auer* deference is "contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well").

The Court has made efforts to rein in the "unfair surprise" problem that naturally flows from this doctrine, *see, e.g., SmithKline*, 567 U.S. at 155-57, but courts continue to defer to agency interpretations without due consideration of the reasonableness of the explanation. *See, e.g., Novartis*, 611 F.3d at 153-55 (court deferred to DOL's interpretation of FLSA even though it was unsupported by implementing regulations and agency's course of conduct); *see also Columbia Gas Transmission, LLC v. 1.01 Acres*, 768 F.3d 300, 316-17 (3d Cir. 2014) (Jordan, J., dissenting) (criticizing majority for deferring to an agency interpretation that was at odds with regulatory language and was adopted in a footnote to "an unrelated rulemaking ... in reaction to the District Court's decision in [that] case"); *United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from denial of certiorari) (the case is "emblematic of the failings of *Seminole Rock* deference").

If any deference is to be given to an agency's interpretation of its own ambiguous regulation, a standard akin to that found in *Skidmore v. Swift & Co.*, is more appropriate. Under *Skidmore*, whether deference to an agency interpretation is warranted depends on "the

thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." 323 U.S. 134, 140 (1944).

CONCLUSION

For the reasons set forth above, the *amicus curiae* Center for Workplace Compliance respectfully submits that the Court should overrule *Auer* and *Seminole Rock*, and that the decision below should be reversed.

Respectfully submitted,

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